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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DENNIS LAMAR REED, Defendant and Appellant.	E052504 (Super.Ct.No. FSB054315) OPINION

APPEAL from the Superior Court of San Bernardino County. Annemarie G. Pace, Judge. Affirmed.

Christopher Nalls, under appointment by the Court of Appeal; Philip Kent Cohen and Keith J. Bruno, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Lise S. Jacobson, Steve Oetting, and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Dennis Lamar Reed appeals from his conviction of first degree murder (Pen. Code,[1] § 187, subd. (a)) and shooting at an occupied motor vehicle (§ 246), with true findings on allegations that he personally used a firearm (§ 12022.53, subd. (b), personally discharged a firearm (§ 12022.53, subd. (c)), and personally discharged a firearm causing death (§ 12022.53, subd. (d)) in the commission of the murder. Defendant contends his sentence was unauthorized because he committed the crimes when he was 15 years old; section 190.5 prohibits a sentence of life without parole (LWOP) for juveniles under the age of 16; and his sentence of 50 years to life was the functional equivalent of LWOP. He also contends his sentence violates the Eighth Amendment because it was grossly disproportionate when applied to a juvenile. In a supplemental brief, he contends his trial counsel provided ineffective assistance by failing to have an eyewitness identification expert testify at trial. We find no error, and we affirm.

II. FACTS AND PROCEDURAL BACKGROUND

In the afternoon of February 1, 2006, Keith Pezant went to a barbershop in San Bernardino. His friends, Ricky Woods[2] and defendant, entered and then went out to the parking lot. Defendant's nickname was "Coball," and Woods's nickname was "Little Nasty." Pezant told a police officer that Woods and defendant had arrived at the

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[1] All further statutory references are to the Penal Code.

[2] Woods was tried jointly with defendant; however, the jury was unable to reach a verdict, and the court declared a mistrial as to Woods.

barbershop in a red Honda Civic that belonged to Woods's girlfriend; however, at trial, Pezant testified he did not make those statements.

Jamal Hampton was also at the barbershop with Kenneth Moore and two other friends. Hampton telephoned Eder Rodriguez to ask for a ride, and Rodriguez arrived in his green Honda Civic. When the group walked outside, Moore saw two young men following them and "mad-dogging" them. Moore had never seen the two before. Moore described them both as African-American, both about five feet 10 inches tall, and both with the same skin tone. One of them said, "What's up?" and Hampton replied, "What's up?" The two men got into a red Civic parked next to the green Civic. Moore did not identify defendants at trial. He had previously selected defendant's and Woods's photographs from a photo lineups, and he had identified a third person in a photo lineup a few days later.

Rodriguez testified that when Hampton and his friends were walking toward Rodriguez's car, two men approached and were "mad-dogging" them. The one who had a darker skin tone opened his jacket, and Rodriguez saw the handle of a gun sticking out of the man's pants waist. Rodriguez said, "I don't want any problems like that." Rodriguez selected defendant's photograph out of a photo lineup as the man who had the gun. Rodriguez did not identify defendant in court, although he stated defendant "most resemble[d] the gentleman" whose photo Rodriguez had selected.

When Rodriguez drove out of the lot, the red Civic followed closely and turned whenever Rodriguez's car turned. Rodriguez drove about three miles to Cajon Boulevard to drop off Hampton, but he missed the side street and made a U-turn in the middle of

Cajon Boulevard. While he was making the turn, the red Civic tried to ram his car but missed. The red Civic then turned to keep following the green Civic. In the rearview mirror, Rodriguez saw someone roll down the rear passenger window of the red Civic. Rodriguez started to speed up. Several gunshots came from the red Civic, striking Rodriguez's car. Hampton was struck in the chest and killed.

Woods's friend had loaned the red Civic to defendant and two others on February 1, 2006. Defendant and Woods returned the car the next day.

Defendant was born on August 2, 1990; he was 15 years old at the time of the crimes.

The jury found defendant guilty of first degree murder (§ 187, subd. (a)) and shooting at an occupied motor vehicle (§ 246) and found true the allegations that he personally used a firearm (§ 12022.53, subd. (b)), personally discharged a firearm (§ 12022.53, subd. (c)), and personally discharged a firearm causing death (§ 12022.53, subd. (d)) in the commission of the murder. The trial court sentenced him to 25 years to life for the murder and a consecutive term of 25 years to life for discharging a firearm causing death. The court stayed the sentences for shooting at an occupied motor vehicle and for the remaining enhancements under section 654.

Additional facts are set forth in the discussion of the issues to which they are relevant.

III. DISCUSSION

A. Unauthorized Sentence

Defendant contends his sentence was unauthorized because he committed the crimes when he was 15 years old; section 190.5 prohibits a sentence of LWOP for juveniles under the age of 16; and his sentence of 50 years to life was the functional equivalent of LWOP.

1. Defendant's Sentence Was Statutorily Authorized

Section 190, subdivision (a) provides that the sentence for first degree murder "shall be . . . death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life." The Legislature has also fixed the punishment for a section 12022.53, subdivision (d) enhancement as 25 years to life. Defendant was sentenced to 25 years to life for the murder and to a consecutive term of 25 years to life for discharging a firearm causing death. Both terms were authorized under the relevant statutes. (§§ 190, subd. (a), 12022.53, subd. (d).)

2. Defendant's Sentence Was Not the Functional Equivalent of LWOP

Under California statutes the sentences of death or LWOP apply to persons convicted of first degree murder with one or more special circumstances. (§ 190.2) In addition, section 190.5, subdivision (b) gives the court discretion to sentence a defendant who committed such a crime at age 16 or 17 to 25 years to life instead of LWOP. Courts have held that a defendant who was 14 or 15 years old when he committed a murder may not be sentenced to LWOP. (*People v. Demirdjian* (2006) 144 Cal.App.4th 10, 17; see

also *People v. Blackwell* (2011) 202 Cal.App.4th 144, 154-155). We therefore agree that defendant could not have been sentenced to LWOP.

Defendant argues that his sentence was the functional equivalent of LWOP. In *People v. Mendez* (2010) 188 Cal.App.4th 47, the court reversed a sentence of 84 years to life for carjacking, assault with a firearm, and seven counts of robbery with gang and firearm enhancements for a defendant who was 16 when he committed the crimes. (*Id.* at pp. 62-68.) The court noted that because the defendant would not be eligible for parole until he was well past his life expectancy, his sentence was "'materially indistinguishable'" from LWOP. (*Id.* at p. 63.)

To support his argument that his sentence was equivalent to LWOP, defendant asserts that "[a]s an African-American male born in 1990, [his] life expectancy is 64.5 years," and defendant "will not be eligible for parole until he is 65—about the time he is expected to die." Defendant cites a data table from the Centers for Disease Control: <http://www.cdc.gov/nchs/data/hus/hus10.pdf> [as of August 4, 2011]. However, a person's life expectancy at birth is not the same as that person's remaining life expectancy later in life. The Centers for Disease Control and Prevention, National Vital Statistics Reports, Volume 57, Number 1, U.S. Decennial Life Tables for 1999-2001, lists the average remaining lifetime for a Black male 15-16 years old to be 54.57 years. (See <http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_01.pdf> [as of Sept. 25, 2012].) Moreover, defendant was sentenced on November 15, 2010, when he was already 20 years old, and he was given credit for 1734 days in custody. With just over 45 years remaining before parole eligibility, his remaining life expectancy was then 49.92 years.

(See <http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_01.pdf> [as of Sept. 25, 2012].) Thus, defendant has a reasonable chance of qualifying for parole before the end of his natural life, and *People v. Mendez* is distinguishable on that basis (as well as on the fact that the defendant in that case committed nonhomicide offenses). Defendant's sentence of 50 years to life was not the functional equivalent of LWOP.

B. Proportionality of Sentence

Defendant further contends his sentence violates the Eighth Amendment because it was grossly disproportionate when applied to a juvenile.[3]

The Eighth and Fourteenth Amendments to the United States Constitution prohibit cruel and unusual punishment, and the United States Supreme Court has held that a criminal sentence is cruel and unusual if it is grossly disproportionate to the crime for which the defendant was convicted. (*Graham v. Florida* (2010) 560 U.S. __ [130 S.Ct. 2011, 2021–2022, 176 L.Ed.2d 825] (*Graham*).) In that case, the court held that LWOP sentences for juvenile defendants who commit nonhomicide offenses are categorically prohibited under the Eighth Amendment. (*Graham*, *supra*, 130 S.Ct. at pp. 2022-2023.)

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[3] After briefing was completed in this case, the United States Supreme Court issued its decision in *Miller v. Alabama* (2012) __ U.S. __ [132 S.Ct. 2455] (*Miller*), and the California Supreme Court issued its decision in *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*). In *Miller*, the court held that *mandatory* sentences of life without parole for those who were under the age of 18 when they committed their crimes were cruel and unusual punishment under the Eighth Amendment, even when the crimes were homicide. (*Miller, supra*, at p. __, 132 S.Ct. at p. 2469.) In *Caballero*, the court held that a 16-year-old defendant's total sentence of 110 years to life for three counts of willful, deliberate, and premeditated attempted murder was cruel and unusual punishment because the sentence was the functional equivalent of LWOP. (Id. at p. 265.) Neither *Miller* nor *Caballero* applies to this case because, as we conclude above, defendant did not receive an LWOP sentence, and unlike in *Caballero*, defendant did commit homicide.

The court explained that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers" (*id*. at p. 2027), and juveniles are, by reason of their immaturity, less culpable when compared to adults (*id.* at p. 2026).

The *Graham* court noted that in determining whether punishment is cruel and unusual, "[t]he Court's cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty." (*Graham, supra,* 130 S.Ct. at p. 2021.)

In *Graham,* the court stated that in the cases adopting categorical rules, "[t]he Court first considers 'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue. [Citation.] Next, guided by 'the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose,' [citation], the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution. [Citation.]" (*Graham, supra,* 130 S.Ct. at p. 2022.)

While defendant argues this court should extend a categorical prohibition on LWOP sentences to juvenile homicide offenders, defendant makes no showing of "'objective indicia of society's standards, as expressed in legislative enactments and state practice'" (*Graham, supra,* 130 S.Ct. at p. 2022) to support an argument that there is a

national consensus against imposing LWOP sentences on juvenile homicide offenders. Instead, the court in *Graham* expressly limited its categorical prohibition to LWOP sentences imposed on juveniles who commit nonhomicide offenses. (*Id.* at p. 2023.) Moreover, as discussed above, defendant did not receive LWOP; he received an indeterminate sentence under which he likely will be eligible for parole during his natural life. We therefore reject the argument that defendant's punishment was categorically unconstitutional.

In cases applying the alternative classification set forth in *Graham*, "[a] court must begin by comparing the gravity of the offense and the severity of the sentence. [Citation.] '[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality' the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. [Citation.]" (*Graham, supra,* 130 S.Ct. at p. 2022.)

In comparing the gravity of the offense with the severity of the sentence, we first note that defendant's term was based on both the murder and the firearm use enhancement. California courts have regularly observed that first degree murder ranks among the most serious crimes. (See, e.g., *People v. Brown* (1996) 42 Cal.App.4th 461, 478 [Fourth Dist., Div. Two] ["'murder has always been recognized as the most serious of crimes'"]; *Williams v. Superior Court* (1983) 34 Cal.3d 584, 593["murder [is] . . . one of the most serious offenses even when special circumstances are not alleged"].) In *Graham*, the United States Supreme Court likewise stated that homicide ranks among the

most serious crimes. The court stated: "There is a line 'between homicide and other serious violent offenses against the individual.' [Citation.] Serious nonhomicide crimes 'may be devastating in their harm . . . but "in terms of moral depravity and of the injury to the person and to the public," . . . they cannot be compared to murder in their "severity and irrevocability." [Citations.] This is because '[l]ife is over for the victim of the murderer,' but for the victim of even a very serious nonhomicide crime, 'life . . . is not over and normally is not beyond repair.' [Citation.] Although an offense like robbery or rape is 'a serious crime deserving serious punishment,' [citation], those crimes differ from homicide crimes in a moral sense." (*Graham, supra,* 130 S.Ct. at p. 2027.)

California courts have also recognized that a violation of section 12022.53 makes a crime even more serious. As the court explained in *People v. Martinez* (1999) 76 Cal.App.4th 489, 497, 498, "[T]he Legislature determined in enacting section 12022.53 that the use of firearms in the commission of the designated felonies is such a danger that, 'substantially longer prison sentences must be imposed . . . in order to protect our citizens and to deter violent crime.' The ease with which a victim of one of the enumerated felonies could be killed or injured if a firearm is involved clearly supports a legislative distinction treating firearm offenses more harshly than the same crimes committed by other means, in order to deter the use of firearms and save lives."

California courts have upheld consecutive terms for murder and for firearm use enhancements (see *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1215-1216 [25 years to life for murder and a consecutive 25 years to life for a section 12022.53 enhancement was not cruel and unusual punishment], even as applied to juveniles (*People v. Em* (2009)

171 Cal.App.4th 964, 972-978 [50-years-to-life sentence for committing murder with a firearm imposed on 15-year-old defendant constitutional]; *People v. Demirdjian*, *supra*, 144 Cal.App.4th at pp. 12-13 [same].) In *People v. Gonzales* (2001) 87 Cal.App.4th 1, although the court found other errors requiring reversal and resentencing, the court rejected the challenge of two 16-year-olds and a 14-year-old that their sentences of 50 years to life in prison for murder were cruel and unusual punishment. (*Id.* at pp. 16-19.) As to the 14-year-old defendant, the court stated: "While Jimenez's youth and incidental criminal history are factors in his favor, they are substantially outweighed by the seriousness of the crime and the circumstances surrounding its commission . . . . The lack of a significant prior criminal record is not determinative in a cruel and unusual punishment analysis. [Citation.] Jimenez poses a great danger to society. Under the circumstances of this case, the sentence is not grossly disproportionate to the crime and does not constitute cruel and unusual punishment." (*Id.* at p. 17.) And in *People v. Blackwell* (2011) 202 Cal.App.4th 144, 156-157, the court affirmed an LWOP sentence imposed on a defendant who committed felony murder at age 17.

Finally, we compare defendant's sentence with sentences imposed for similar crimes in other jurisdictions. In a concurring opinion in *Graham*, Chief Justice Roberts stated there was "nothing *inherently* unconstitutional about imposing sentences of life without parole on juvenile offenders . . . ." (*Graham*, *supra*, 130 S.Ct. at p. 2041 (Roberts, C.J., concurring).) Moreover, even after *Graham*, courts in other jurisdictions have regularly affirmed LWOP sentences for juveniles who committed homicide. (E.g., *State v. Andrews* (Mo. 2010) 329 S.W.3d 369, 376-377 & fn. 6 [affirming LWOP

sentence for 15-year-old who committed first degree murder, and collecting cases]; *State v. Draper* (2011) 151 Idaho 576, 599 [261 P.3d 853] [affirming "fixed life" sentence for 16-year-old who committed murder, and collecting cases].)

In *Roper v. Simmons* (2005) 543 U.S. 551, the court held that it was unconstitutional to impose the death penalty on a person who committed murder when he was 17 years old. In so holding, the court observed that it was unclear whether the death penalty had any deterrent effect on juveniles, and "it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person." (*Id.* at p. 572.) The court's observation may be read as an implicit endorsement of LWOP as an appropriate sentence for a juvenile who commits murder.

In light of these authorities, we conclude that defendant's sentence of 50 years to life was not cruel and unusual punishment.

C. Assistance of Counsel

Defendant contends his trial counsel provided ineffective assistance by failing to have an eyewitness identification expert testify at trial.

A criminal defendant asserting ineffective assistance of counsel on appeal must show that (1) counsel's performance was deficient under an objective standard of professional responsibility and (2) there is a reasonable probability that but for counsel's errors, a more favorable determination would have resulted. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.)

The record before us does not disclose what actions, if any, trial counsel undertook to find an eyewitness identification expert who would give favorable testimony. Thus, the claim is not properly brought on direct appeal. (See *People v. Datt* (2010) 185 Cal.App.4th 942, 951-953.) In that case, the defendant raised a similar claim that his trial counsel had provided ineffective assistance by failing to present an eyewitness identification expert. The court held that defendant's contention "fails at its origin. He has not shown that his trial counsel *could have* presented any *favorable* expert testimony." (*Id.* at p. 952.) The court further explained that even through the defendant had produced testimony at a motion for new trial "that a reasonably competent attorney would have *consulted* an expert on eyewitness identification," he produced no evidence that his trial counsel had failed to do so. (*Id.* at p. 952-953.) Here, likewise, defendant's contention "fails at its origin" on direct appeal.

IV. DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

MCKINSTER
J.

KING
J.